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IN THE

Supreme Court of the United States

October Term, 1969

No. 1409

MEILAH BELL,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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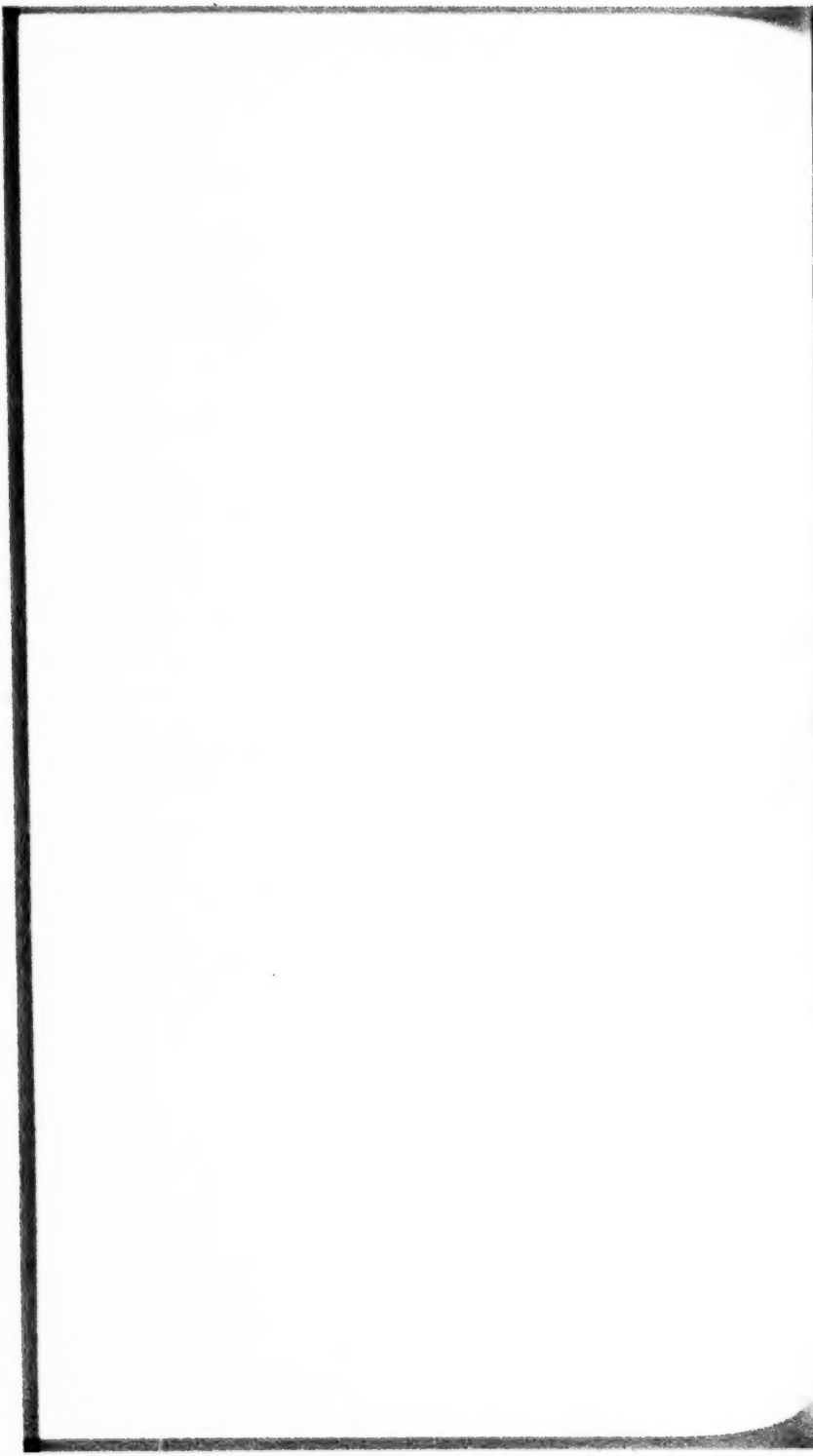

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MEILAH BELL,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Meilah Bell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on March 12, 1970.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. It is reprinted as an appendix hereto, *infra*. This is the second time this case has been before the Court of Appeals. The opinion of the first case is reported at 392 F. 2d 207 (3rd Cir. 1968).

Jurisdiction

The judgment of the Court of Appeals was entered on March 12, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. Whether petitioner's prosecution for felonies in the United States District Court for the District of the Virgin Islands, instituted by the filing of an information by the United States Attorney, and not by indictment of a grand jury, violates petitioner's rights under the Fifth Amendment to the United States Constitution, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury".

2. Where, at the first trial, petitioner was sentenced to five years imprisonment on each of seven counts, with counts one and two to run consecutively, and all other counts to run concurrently with counts one and two and with each other; and where, at the second trial, petitioner was sentenced to nine years imprisonment on each count, to run concurrently, whether said second sentence was illegal and constitutionally improper, under this Court's decision in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), especially where there was nothing in the record or presented to the second trial judge warranting an increase in sentence as to each count.

3. Whether petitioner received a fair trial at the hands of the second trial judge.

Constitutional Provision, Statute and Rule Involved

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

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Title 48, United States Code, § 1615

§ 1615. Judicial divisions; sessions; applicability of procedural rules; prosecution by information or indictment.

The Virgin Islands consists of two judicial divisions; the Division of Saint Croix, comprising the island of Saint Croix and adjacent islands and cays and the Division of Saint Thomas and Saint John, comprising the islands of Saint Thomas and Saint John and adjacent islands and cays. The district court shall hold sessions in each division at such time as the court may designate by rule or order, at least once in three months in each division. The rules of practice and procedure heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to § 2072 of Title 28 in civil cases, § 2073 of such title, United States Code, in admiralty cases, and § 53 of Title 11 in bankruptcy cases, shall apply to the District Court of the Virgin Islands and to appeals therefrom. All offenses shall continue to be prosecuted in the District Court by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury. July 22, 1954, c. 588, § 25, 68 Stat. 507.

Rule 54(a)(1), Federal Rules of Criminal Procedure

Rule 54. Application and Exception.

(a) Courts and Commissioners.

(1) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam and the District Court of the Virgin Islands; in the United States Courts of Appeal; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

Statement of the Case

The Information

The information which was filed against petitioner and upon which he was tried at the first trial contained eight counts, alleging violations of Title 14, Virgin Islands Code, § 834, subdivision 2, by the obtaining of property or money through the use of false and fraudulent representations or pretenses. This statute provides for a maximum term of 10 years imprisonment, and therefore, is a felony. In general terms each count charged that petitioner defrauded various business establishments in St. Thomas, Virgin Islands "or American Express Company" by representing himself to be one Meyer Odence and by presenting an American Express Credit card issued in the name of Meyer Odence.

Counts I, II, III and IV were alleged to have been committed on March 10, 1965, and Counts V, VI, VII and VIII were alleged to have been committed on March 11, 1965. The business establishments and amounts involved are as follows:

I—A. H. Riise's Gift Shop	$558.00
II—Bolero, Inc.—V.I. Hilton Store ..	175.00
III—Cardow, Inc.	495.00
IV—C & M Caron	430.00
V—C & M Caron	430.00
VI—L'Escale	189.75
VII—Cardow, Inc.	138.00
VIII—Cardow, Inc.	360.00

However, at the first trial, Count V was dismissed by the prosecutor during the trial.

A new information was filed against petitioner immediately prior to the second trial, but he was never arraigned on this information. This information contained seven counts, with former count four and dismissed count five combined to form a new count four alleging the obtain-

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ing of property by false pretenses from C & M Caron, on March 11, 1965, in the amount of $860 (T.R. 136). Counts six, seven and eight of the first information were renumbered as counts five, six and seven of the second information. Apparently what the prosecutor did, without authority, was to multiply counts four and five to make one count of $860, now labelled count four. Apart from this being a material variance of the charge of count four as originally filed, the inclusion of the elements of original count five in said count after it had been dismissed from the case by the prosecutor at the first trial, is strange, unauthorized and prejudicial to petitioner. This situation seems to have escaped the attention of all parties to the trial, and appears only in the trial record. Before the Court of Appeals petitioner moved to dismiss count four from the case for material variance and prejudice to his rights, as well as double jeopardy as to that part constituting count five, now incorporated into count four, after it had been dismissed by the prosecutor at the first trial. This motion was not specifically denied, but apparently was denied by the affirmance of the judgment of conviction by the Court of Appeals.

The Record

The record of this case before the Court of Appeals consisted of the complete type record of the District Court, which was reproduced by the offset method, and nine copies of this record were filed in the Court of Appeals. This record is presented to this Court on this petition.

Preliminary Proceedings

Two informations were filed against petitioner Meilah Bell in the United States District Court for the District of the Virgin Islands charging in one, in the name of the

United States of America, the crime of interstate transportation, flight or movement by Mr. Bell to avoid prosecution in violation of Title 18, United States Code, § 1073; and in the second, in the name of the Government of the Virgin Island, in eight counts, the crimes of obtaining money and property by false pretenses, in violation of Title 14, Virgin Islands Code, § 843, subdivision 2.

In advance of the first trial petitioner filed a motion with the district court, moving to dismiss both informations, on the ground that each charged felonies, which had not been returned by indictment or presentment of a grand jury, in violation of the Fifth Amendment to the Constitution of the United States.

The record of the first trial does not disclose any order or opinion of the district court deciding this motion; but since petitioner was tried, convicted, sentenced and imprisoned on the information charging the false pretenses counts, it is fair to state that the pre-trial motion was denied when the first trial judge denied all motions made at the close of the government's case (see Record on Appeal, First Trial, U.S.C.A. 3rd Cir., Docket No. 16523 (App. App., Vol. II, pp. 92-93)). This motion was renewed on the record at the second trial, and was denied (T.R. 126).

Petitioner was not tried at the first trial on the information charging violation of Title 18, United States Code, § 1073 and this charge was "dismissed" on motion of the prosecutor, when he stated that said charge was "passed" (see Record on Appeal, First Trial, U.S.C.A. 3rd Cir., Docket No. 16523 (App. App. Vol. II, p. 85)). At the second trial no mention was made of this matter.

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The Facts

To a great extent the second trial was a carbon copy of the first trial. The only counts on which evidence directly against petitioner was offered were counts one, four and five (this being count six in the original information, renumbered for the second trial). On the other four counts, that is two, three, six and seven (six formerly being seven, and seven formally being eight) no witnesses were called at all to testify that it was petitioner who was the purchaser.

On the counts as to which petitioner was identified as the purchaser of merchandise using the Meyer Odence credit card, count one was Mrs. Joy Gould (T.R. 81-90). Mrs. Gould testified on direct examination that she was employed at A. H. Riise Gift Shop in March, 1965, as a salesgirl (T.R. 81), that on March 10, 1965, she sold petitioner a Patek Philippe watch for $558, through his use of the Meyer Odence American Express credit card (T.R. 82-86). She identified petitioner as the purchaser. On cross-examination it developed that her identification of petitioner resulted from her being shown a photograph of appellant by an FBI Agent McGee (T.R. 89).

On count five (formerly six), the witness was Mrs. Petrona Small (T.R. 92-103). At the first trial Mrs. Small testified on this transaction, as did a Mrs. Annie Peters, who did not testify at the second trial. Mrs. Small identified petitioner as the person who purchased items aggregating $189.79 on the use of a credit card in the name of Meyer Odence.

On count four the witnesses were George Parrott (T.R. 40-60) and his wife, Mrs. Margareta Parrott (T.R. 62-80a). They testified that they sold petitioner a Piaget watch (on the Odence credit card) for $860.

All witnesses identifying petitioner testified that he was accompanied by another man. This other man osten-

sibly was Alexander Turner. See the trial record of the first trial and the Turner record before the Court of Appeals, 409 F. 2d 102 (U.S.C.A. 3rd Cir., Docket No. 15964).

As to counts two, three, six (formerly seven) and seven (formerly eight), the only witnesses to these transactions were bookkeeping or office personnel who identified records. No connection to petitioner as to these counts was ever made. A motion at the close of the government's case to dismiss these counts for lack of connection was denied (T.R. 126).

The Charge of the Trial Judge

In the course of his charge to the jury the trial judge included the following:

> "But I say to you, members of the jury, that this is an important case. I think we can assume, or at least I believe, but my belief isn't binding on you, that somebody—I think the evidence is overwhelming—that somebody came into St. Thomas on March 10th and 11th of 1965 and took a lot of valuable merchandise out by the misuse of a credit card. Now, members of the jury, if that man was Miliah Bell and you are convinced of that beyond a reasonable doubt, I think you have a duty to convict him. If you are not satisfied beyond a reasonable doubt, you have a duty to acquit him" (T.R. 167).

The Sentence

After the first trial petitioner was sentenced as follows: Five years imprisonment on count one, and five years imprisonment on count two, with the sentence on count two to run consecutively with the sentence on count one. Five years on each of the other counts, to run concurrently with

the sentences on counts one and two. Thus the total sentence aggregated ten years, but on no count was the sentence more than five years imprisonment.

At the conclusion of the second trial petitioner, a first felony offender, received a sentence of nine years imprisonment on each count to run concurrently. There was nothing in the record or presented to the second trial judge warranting an increase in sentence as to each count.

Reasons for Granting the Writ

The principal reason for granting the writ in this case relates to the question of whether a felony prosecution can be had in any United States District Court without an indictment returned by a grand jury. The other reasons for granting the writ, set forth herein, relate to other aspects of this case:

1. Petitioner's prosecution for felonies in the United States District Court in the District of the Virgin Islands, instituted by the filing on an information by the United States Attorney and not by indictment of a grand jury, violates petitioner's rights under the Fifth Amendment to the United States Constitution, which provides that "no person shall be held to answer for a capital, or otherwise infamous crime unless on presentment or indictment of a Grand Jury". It is petitioner's contention that all prosecutions for felony charges in a United States District Court must be instituted by a grand jury indictment. The failure to require grand jury indictments for felonies in the Organic Act of the Virgin Islands (Title 48, United States Code, § 1615) violates the clear provisions of the Fifth Amendment to the Constitution so as to render such provision unconstitutional.

In sustaining the present prosecution, the Court of Appeals, in the first opinion in this case (392 F. 2d 207,

208, fn. 1 (3rd Cir. 1968)), simply cited its own opinion, by Circuit Judge Maris, in *Rivera* v. *Government of the Virgin Islands,* 375 F. 2d 988, 991 (3rd Cir. 1967), to the effect that felonies need not be prosecuted by indictment in the United States District Court for the Virgin Islands.

The theoretical basis for the argument of the government that the constitutional requirement for indictment by a grand jury of felony charges (Amendment V to the Constitution; Title 18, United States Code, § 1). as being inapplicable to the unincorporated territory of the Virgin Islands, is the holding of this Court in 1884, in *Hurtado* v. *California,* 110 U.S. 516, that a state may, consistent with the Fourteenth Amendment, dispense with indictment by a grand jury as a pre-condition or method of felony prosecution. As to state practice, this holding was recently reaffirmed, *Beck* v. *Washington,* 369 U.S. 541 (1962).

The government next relies upon the *Insular Cases* (*Downes* v. *Bidwell,* 182 U.S. 244 (1901) and its companion cases, and *Dorr* v. *United States,* 195 U.S. 138 (1904); as well as *Balzac* v. *Porto Rico,* 258 U.S. 298 (1922)), to the effect that the constitutional safeguards of the Bill of Rights are not applicable to citizens of the United States or resident aliens who are in unincorporated territories abroad from the continental United States.

It is respectfully suggested that such law is no longer valid, in light of recent decisions of this Court, and that *Hurtado, supra,* was never applicable to courts created or organized either under Article III of the Constitution or by appropriate legislation of the Congress ("legislative courts"). For this reason, Title 48, United States Code, § 1615 is unconstitutional, and Rule 54(a)(1), Federal Rules of Criminal Procedure, to the extent that it authorizes prosecution of felonies by information in the District Courts of Guam and the Virgin Islands, is also unconstitutional.

The *rationale* for this contention is the expanding scope of the constitutional protection of individuals under the Bill of Rights as to both the federal government and the states. See, *e.g., Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *Gideon* v. *Wainright,* 372 U.S. 335 (1963); *Jackson* v. *Denno,* 378 U.S. 368 (1964); *Malloy* v. *Hogan,* 378 U.S. 1 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966), among others.

Moreover, in the line of cases determining that dependents of foreign-based military personnel, government civilian employees with the military, and others accompanying the armed forces overseas, are not subject to military law or trial by courts-marital, as authorized by the Congress in the Uniform Code of Military Justice, Article 2 (11) (Title 10, United States Code, § 802 (11)), this Court held unconstitutional that provision of the statute authorizing such trials. *Reid* v. *Covert,* 354 U.S. 1 (1957); *Kinsella* v. *Krueger,* 361 U.S. 234 (1960); *McElroy* v. *Guagliardo,* 361 U.S. 281 (1960).

Now, when *Reid* v. *Covert* and *Kinsella* v. *Krueger* first came before this Court in 1956 (351 U.S. 487 and 470, respectively), the Court sustained the constitutionality of the foregoing jurisdictional provision of the military code. In so doing it relied principally upon the *Insular Cases, supra, Balzac* v. *Porto Rico, supra* and *In re Ross,* 140 U.S. 453 (1891). In essence these are the cases upon which the government relies to sustain the constitutionality of the present statute, 48 U.S.C. § 1615, and rule, Rule 54(a)(1), FRCrP.

But upon rehearing, and in overruling its prior decisions in the military jurisdiction cases, and in extending the unconstitutionality of this statute to civilian employees (*Guagliardo, supra*), this Court in effect overruled the *rationale* of the *Insular Cases* and *Balzac.* See, *Reid* v. *Covert, supra,* pp. 7-14. It adopted really the dissents of Mr. Justice Harlan (grandfather of the present justice by that name) in *Downes* v. *Bidwell, supra, Dorr* v. *United*

States, supra and *Hawaii* v. *Mankichi,* 190 U.S. 197 (1903). Although the Court distinguished the *Insular Cases,* nevertheless there is really no basis for such distinction as a matter of constitutional law.

In his opinion in the *Rivera* case, *supra,* Judge Maris attacked the practice of using the grand jury to return indictments for all felonies as "cumbersome and outmoded" (375 F. 2d 988, 991). Notwithstanding such judicial opposition or derogation of the grand jury requirement it is a constitutional provision which requires their use and any elimination of the grand jury must come through constitutional amendment, not judicial dislike for it. Since the constitution requires grand jury indictment for all "infamous" (*i.e.,* felony) charges, the failure to provide for such body renders the judicial proceedings held wtihout indictment as constitutionally defective. Accordingly, it is appropriate to grant certiorari in this case to resolve this important question of constitutional law affecting all inhabitants in the Territories of the Virgin Islands and Guam.

2. Where, at the first trial, petitioner was sentenced to five years imprisonment on each of seven counts, with counts one and two to run consecutively, and all other counts to run concurrently with counts one and two and with each other, and where, at the second trial, petitioner was sentenced to nine years imprisonment on each count, to run concurrently, said second sentence was illegal and constitutionally improper, under this Court's decision in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), especially where there was nothing in the record or presented to the second trial judge warranting an increase in sentence as to each count.

It is petitioner's contention that such sentence is illegal under the holdings of such cases as *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *United States* v. *Coke,* 404 F. 2d 836 (2nd Cir. 1968); *United States* v. *Chiarella,* 214

F. 2d 838 (2nd Cir. 1954). Since each count must stand alone, the imposition of nine year terms in place of five year terms on each count is patently illegal under the *Pearce* doctrine, *supra,* especially where no grounds for such increased sentence on each count is set forth in the record, and is not based on any evidence of intervening misconduct on the part of petitioner.

3. Petitioner did not receive a fair trial at the hands of the second trial Judge. In making this argument, petitioner is aware that matters relating to trial conduct are often not reviewed by this Court, especially where the Court of Appeals has considered such matters.

Two principal points stand out on the conduct of the trial, as to which petitioner complains. The first relates to the failure of the Court to instruct the jury on identification testimony, as requested by petitioner. The second relates to the judge's charge to the jury.

In the charge of the trial court to the jury, the court stated it was its "belief (which) isn't binding on you, that somebody—*I think the evidence is overwhelming*—that somebody came into St. Thomas on March 10th and 11th of 1965 and took a lot of valuable merchandise out by the misuse of a credit card" (T.R. 167).

Such instruction withdrew key and crucial fact issues in this case from the jury's consideration. It told the jury that the sole issue in the case was whether or not it was petitioner who did these things: came into St. Thomas; took a lot of valuable merchandise out; by the misuse of a credit card. The very issue of the case was preempted from the jury. And at that point the trial judge did not, as he most assuredly should have done, tell the jury that they were the sole and exclusive judges of the facts at issue in the case, what those issues were, and that his views of the evidence were not binding on them and should not be considered by them in their deliberations.

The offending paragraph of this charge was so prejudicial as to require a new trial. *United States* v. *Chibbaro,* 361 F. 2d 365, 378-379 (3d Cir. 1966, per Biggs, Ch. J.); *United States* v. *Curzio,* 170 F. 2d 354, 357 (3rd Cir. 1948). *Moody* v. *United States,* 377 F. 2d 175, 178-179 (5th Cir. 1967).

As to the failure of the trial judge to give petitioner's requested charge on identification, and since none at all on this subject was given to the jury, its omission was prejudicial to petitioner and to the theory of the defense reasonably raised by the evidence. See, e.g., *Sugarman* v. *United States,* 249 U.S. 182 (1919); *United States* v. *Kushner,* 135 F. 2d 668, 674 (2nd Cir. 1943); cert. den. 320 U.S. 212; *United States* v. *O'Connor,* 237 F. 2d 446, 474 fn. 8 (2nd Cir. 1956); *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association,* 282 F. 2d 137, 140 (2nd Cir. 1960).

Here the judge intimated that petitioner "produced no testimony to start with" (T.R. 170) as a basis for refusing his instruction on identification; but the matter does not end there, for any defense reasonably raised by the evidence (regardless of who produces the witnesses) warrants an instruction to the jury. Much of petitioner's case turned on his cross-examination of the prosecution's witnesses ability to identify and remember petitioner as the one who used the Odence credit card. His requested instruction should have been given; the failure to do so constitutes prejudicial error.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

April 7, 1970

APPENDIX

(Opinion of the Court)

(Filed March 12, 1970)

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 17978

—o—

Government of the Virgin Islands

v.

Meliah Bell,

Appellant.

On Appeal From the District Court of the Virgin Islands, Division of St. Thomas and St. John

—o—

Argued January 30, 1970
at Charlotte Amalie, St. Thomas

Before Hastie, *Chief Judge*, and Staley and Stahl,* *Circuit Judges.*

Per Curiam.

Meliah Bell is before this court for the second time, having been twice tried, convicted, and sentenced[1] for

* Judge Stahl heard the argument and participated in the consideration of the appeal in this case but not in the decision which occurred after his death.

[1] On appeal from the first conviction, this court reversed and remanded the case for a new trial. See Government of the Virgin Islands v. Bell, 392 F.2d 207 (C.A. 3, 1968).

violating 14 V.I.C. § 834(2) by obtaining money or property under false pretenses. The property was obtained through the use of an American Express Company credit card issued to one Meyer Odence.

Appellant contends that the initiation of this prosecution by information rather than by grand jury indictment was in violation of the Fifth Amendment; that the trial judge committed prejudicial error by commenting on the evidence during his charge to the jury; that the evidence did not establish his guilt as to each separate count of the information; and that the sentence imposed on him after his conviction at the second trial was improper because it exceeded the sentence imposed at the first trial. See North Carolina v. Pearce, 395 U.S. 711 (1969).

We have carefully considered each of appellant's arguments and find them to be without merit. The judgment of the district court will, therefore, be affirmed, but without prejudice to appellant to file a motion in the district court for reduction of sentence. See Government of the Virgin Islands v. Turner, 409 F.2d 102 (C.A. 3, 1969).

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.